2003

State of Utah v. Duane Potts : Reply Brief

Utah Court of Appeals

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IN UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellant,	:	
v.	:	
DUANE POTTS,	:	Case No. 20030702-CA
Defendant/Appellee.	:	

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

RESPONSE TO POINT I(A) OF DEFENDANT'S BRIEF: THE DISTRICT COURT PLAINLY ERRED IN QUASHING THE BINDOVER WITHOUT REVIEWING THE USSS REPORT CONSIDERED BY THE MAGISTRATE

In Point I(A) of his brief, defendant admits that Judge Frederick granted the motion to quash the bindover order without the benefit of reviewing the United States Secret Service (USSS) report that was before the magistrate. *See* Aple. Br. at 12-15. Defendant claims that Judge Frederick did not plainly err in doing so because "[he] had recorded testimony regarding the contents of the report and summaries by both the State and [defendant]." *Id.* at 13.

As defendant argues, to establish that Judge Frederick plainly erred the State must show that "'(1) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful.'" *State v. Marvin*, 964 P.2d 313, 318 (Utah 1998) (quoting *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993)). Here, the error in quashing the

magistrate's bindover order on an incomplete record should have been obvious to Judge Frederick. *See State v. Wodskow*, 896 P.2d 29, 32 (Utah App.), *cert. denied*, 910 P.2d 425 (Utah 1995). *Wodskow* expressly holds that it is the "defendant's responsibility to provide the *complete record* to the district court" in support of a motion to quash. *Id.* at n.3 (emphasis added). If, as defendant claims, Judge Frederick necessarily reviewed the preliminary hearing transcript before quashing the bindover, *see* Aple. Br. at 11, the judge was well aware that the magistrate not only admitted the USSS report, *see* R152:31-32, *see* Add. A (Aplt. Br.), but also accepted the State's arguments that the three-part exhibit supported bindover:[1]

> I have carefully listened to the testimony that has been presented by the captain in this matter, *as well as reviewed the audio authen–authenti–authentication examination report that has been admitted as we've discussed earlier already.*
>
> I do find that while [defense counsel's] arguments and question raise very legitimate issues, that they go to the weight, such as the weight to be given the witness' recollections, whether or not the differences are in fact alterations or whether they are the result of mistakes, are issues that are for the trier of fact.
>
> The–the State's evidence clearly shows probable cause that there was a—that there were differences from the recollections of the original interview that . . . [Lt. Sparks] had with the defendant, that clearly showed not only answers differences [sic] but portions missing *and the report shows that there are indications of alterations of the tape* and that certainly

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[1]Defendant has attached one of the three reports included in Exh. # 1 as an addendum to his brief. *See* Aple. Br. at 12, n.1, and Addendum I. As explained by the prosecutor when she submitted the exhibit to the magistrate, the entire exhibit consisted of "the amended report, the original report, as well as a third report." R152:31. The impropriety of defendant's attaching one part of this extra-record exhibit to his brief is discussed, *infra*, at pp. 5-7, in conjunction with the State's motion to strike the extra-record material.

> shows, sufficient for a preliminary hearing, probable cause that there was a scheme or conduct or an artifice in order to make those admissions–omissions or make those changes for the purposes of defrauding or misrepresenting facts to the hearing board in order to determine whether or not [defendant] ought to be reinstated.

R152:56-57, *see* Add. A (Aplt. Br.) (emphasis added).

Notwithstanding the magistrate's reliance on the USSS report, defendant claims that any error in quashing the bindover order without reviewing the report would not have been obvious to Judge Frederick because he "had the recorded testimony regarding the contents of the report and summaries by both the State and [defendant]." Aple. Br. at 13. Precisely because the parties argued the report's findings to their own advantage, however, it was necessary for Judge Frederick to review the USSS report and determine if the magistrate properly accepted the State's arguments regarding its content, conclusiveness and significance.

Specifically, the State argued the report noted five or six alterations in the tape and emphasized an edit occurring at 1307

> between the word 'palm' and 'I' in the sentence. If it was one down on the (inaudible) he says [']I got this palm,['] edit, [']I says I don't need a palm pilot, I don't know what it is.['] The very beginning of what is possibly the word 'pilot' can be heard just before the edit point.

R152:49-50, *see* Add. A (Aplt. Br.). The prosecutor additionally emphasized the report's finding that there was a suspicious 130 seconds of blank recording on the tape. *Id.* at 50.

Defense counsel, on the other hand, argued that the USSS report was not conclusive proof that the tape was altered, but merely suggested that "probability." R152:52, *see* Add. A (Aplt. Br.). To the extent the USSS report was proof that the tape

had been altered, defense counsel argued that it demonstrated "only three 'probable alterations' where the word 'no' may have been artificially inserted." R80.

Given the parties' differing views regarding the report's content, conclusiveness and significance, it should have been obvious to Judge Frederick that he needed to examine the report itself to determine if the magistrate properly ruled that it supported the bindover order. Just as the district court in *Wodskow* "could not properly review and subsequently reverse the decision of the magistrate because the complete record was not before the court," 896 P.2d at 32, Judge Frederick could not properly review the magistrate's ruling here because he did not have the benefit of the USSS report the magistrate relied on. R152:56-57, *see* Add. A (Aplt. Br.). Judge Frederick's error in quashing the bindover order on an incomplete record was both obvious and prejudicial under *Wodskow* and should be reversed on that ground.

* * *

Motion to Strike Extra-Record Exhibit. In support of his argument that no plain error occurred here, defendant has attached one part of the three-part USSS report to his brief. *See* Aple. Br. at 12, n.1, and Addendum I. While the magistrate admitted the exhibit which included an "amended report, the original report, as well as a third report," the entire exhibit was returned to the prosecutor at the conclusion of the preliminary hearing. *See* R152:31-32, 59, *see* Add. A (Aplt. Br.). As set out in the State's opening brief, and above, the USSS report reviewed by the magistrate in binding defendant over

was not provided to Judge Frederick when defendant moved to quash the bindover; therefore, the exhibit is not part of the record on appeal.

"An appellate court's 'review is . . . [of course] limited to the evidence contained in the record on appeal.'" *State v. Pliego*, 1999 UT 8, ¶ 6, 974 P.2d 279 (quoting *Wilderness Building Systems v. Chapman*, 699 P.2d 766, 767 (Utah 1985)). "[A]ppellate courts of this state do not consider new evidence on appeal." *Finlayson v. Finlayson*, 874 P.2d 843, 847 (Utah App. 1994) (declining to take judicial notice of date that postal zip codes were introduced to the public) (citing *Low v. Bonacci*, 788 P.2d 512, 513 (Utah 1990)). Accordingly, "[this Court] will not consider evidence which is not part of the record." *Pliego*, 1999 UT 8, ¶ 7.

"[A]lthough the record may be supplemented if anything material is omitted, it may not be done," as here, "by simply including the [alleged] omitted material in the party's addendum." *Id.* (citing Utah R. App. P. 11(h) ("If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth")). Defendant's attempt to supplement the record by merely including one part of a three-part exhibit in the addenda to his brief is therefore improper. *Id.* The addendum to a parties' brief "may not consist of evidence that is outside the record on appeal." *Id.* *See also State v. Law*, 2003 UT App 228, ¶ 2, 75 P.3d 923 (holding that because the record contained nothing regarding the judge's drug use when it imposed sentence, "defendant's attempt to

supplement the record by including newspaper articles regarding [the judge's] drug use in his brief's addenda [was] improper").

More importantly, defendant could not have supplemented the record with the "amended report" attached to his brief, even if he had so moved under rule 11(h). "Motions under rule 11(h) of the Utah Rules of Appellate Procedure are 'appropriate only when the record must be augmented because of an omission or exclusion, or a dispute as to the accuracy of reporting, *and not to introduce new material into the record.*'" *Law*, 2003 UT App 228, ¶ 2 (emphasis in original) (quoting *Olson v. Park-Craig-Olson, Inc.*, 815 P.2d 1356, 1359 (Utah App. 1991)). As noted previously, the record contains no indication that Judge Frederick ever received or reviewed any portion of the USSS report relied upon by the magistrate. "Because [defendant] attempts to introduce evidence on appeal not contained in the record, [this court] cannot consider [it] on appeal." *Id.* Thus, the extra-record amended report attached to defendant's brief must be stricken.

RESPONSE TO POINT I(B)-(C) OF DEFENDANT'S BRIEF: JUDGE FREDERICK FAILED TO PROPERLY APPLY THE BINDOVER STANDARD

Defendant acknowledges that "two pieces of evidence" "support" the communications fraud charge upon which he was bound over for trial: "Mr. Sparks' memory, and a report by the Secret Service." Aple. Br. at 16 (citing R152:26-27, 30-31). In Point I(B) of his brief, defendant asserts, however, that "neither piece of evidence indicates that the alleged alteration was made." *Id.* First, defendant speculates that because "only two minutes" of his recording of the internal affairs interview was played

at the CSC review hearing, his full "response" to Lt. Sparks questioning "is likely elsewhere on that tape." *Id.* Second, defendant asserts that the alterations found by the USSS are immaterial because, "[t]here is absolutely no indication that the word 'no' was inserted after the question[,] '[D]id you accept the palm pilot?'" Aple. Br. at 17. Finally, in Point I(C) of his brief, defendant asserts that, assuming his recording of the internal affairs interview was edited, his former defense counsel did it. Aple. Br. at 17-18. At this preliminary stage, defendant's theories are irrelevant. The only question is whether the State's theory, that defendant committed a communications fraud, is reasonable. *See State v. Clark*, 2001 UT 9, ¶ 20, 20 P.3d 300.

Preliminary Hearings and the Probable Cause Standard

As explained in the State's opening brief, the principle purpose of a preliminary hearing is to screen or "'ferret out . . . groundless and improvident prosecutions.'" *State v. Brickey*, 714 P.2d 644, 646 (Utah 1986) (quoting *State v. Anderson*, 612 P.2d 778, 783-84 (Utah 1980) (ellipsis in original)). To that end, Utah courts employ the probable cause standard. *Clark*, 2001 UT 9, ¶ 10 ("To bind a defendant over for trial, the State must show 'probable cause' at a preliminary hearing by 'present[ing] sufficient evidence to establish that 'the crime charged has been committed and that the defendant has committed it'") (quoting *State v. Pledger*, 896 P.2d 1226, 1229 (Utah 1995)) (changes in original). Because the quantum of evidence (probable cause) required for a bindover is the same as that required for an arrest, which is the same as that required for a search, *see State v. Spurgeon*, 904 P.2d 220, 227 (Utah App. 1995), decisions addressing the

necessary showing for an arrest or search are instructive in this preliminary hearing context. *See Clark*, 2001 UT 9, ¶ 16 ("[W]e see no principled basis for attempting to maintain a distinction between the arrest warrant probable cause standard and the preliminary hearing probable cause standard").

In the Fourth Amendment context, as here, probable cause is "more than bare suspicion." *United States v. Brinegar*, 338 U.S. 160, 175 (1949). On the other hand, the evidence to establish probable cause "need not be capable of supporting a finding of guilt beyond a reasonable doubt." *Clark*, 2001 UT 9, ¶ 15. Indeed, the evidentiary burden for probable cause "is *significantly less* than that needed to prove guilt." *State v. Bartley*, 784 P.2d 1231, 1235 (Utah App. 1989) (emphasis added). The facts presented at a preliminary hearing do not even have to establish a prima face case of guilt, as in the case of a directed verdict motion. *Clark*, 2001 UT 9, ¶¶ 11, 16. Moreover, "the evidence required [to show probable cause at this stage of the proceeding] . . . is relatively low because the assumption is that the prosecution's case will only get stronger as the investigation continues." *Evans v. State*, 963 P.2d 177, 182 (Utah 1998); *accord Clark*, 2001 UT 9, ¶ 10.

"In establishing probable cause, as the term suggests, we deal not in certainties, but in 'probabilities.'" *Bartley*, 784 P.2d at 1235 (citing *Brinegar*, 338 U.S. at 175). Ultimately, "probable cause is a *reasonable ground for belief* of guilt." *Brinegar*, 338 U.S. at 1310 (emphasis added) (internal quotes and citations omitted). The Supreme Court in *Brinegar* explained that "[t]hese are not technical; they are the factual and

practical considerations of everyday life on which reasonable and prudent [people], not legal technicians act. The standard of proof is accordingly correlative to what must be proved." 338 U.S. at 1310; *State v. Menke*, 787 P.2d 537, 542 (Utah App. 1990).

The Utah Supreme Court recently recognized that probable cause exists where the "'facts and circumstances . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed . . . an offense.'" *State v. Trane*, 2002 UT 97, ¶ 27, 57 P.3d 1052 (arrest case) (quotations and citations omitted). In other words, probable cause requires no more than a "rationally based conclusion of probability." *State v. Dorsey*, 731 P.2d 1085, 1088 (Utah 1986); *accord State v. Poole*, 871 P.2d 531, 534 (Utah 1994).

As observed by the Supreme Court of Wisconsin, "probable cause at a preliminary hearing is satisfied when there exists a believable or plausible account of the defendant's commission of a felony." *State v. Dunn*, 359 N.W.2d 151, 155 (Wis. 1984). Therefore, even if an innocent explanation for the defendant's conduct might exist, "the law does not require that 'all innocent explanations for a person's actions be absent before those actions can provide probable cause'" for bindover. *See State v. Holmes*, 774 P.2d 506, 509 (Utah App. 1989) (arrest case) (quoting *Wood v. United States*, 498 A.2d 1140, 1144 (D.C. 1985)); *accord Poole*, 871 P.2d at 535 (search case). The probable cause requirement is satisfied as long there exists a reasonable inference that supports a conclusion that the defendant probably committed the crime, even if there are equally strong inferences to the contrary. *See Clark*, 2001 UT 9, ¶ 20 (holding that an inference

of legitimate behavior "does not negate the reasonable inference" of criminal conduct); *see also Dunn*, 359 N.W.2d at 154-156. In short, "'[u]nless the evidence is wholly lacking and incapable of a reasonable inference to prove some issue which supports the [prosecution's] claim,' the magistrate should bind the defendant over for trial." *Pledger*, 896 P.2d at 1229 (quoting *Cruz v. Montoya*, 660 P.2d 723, 729 (Utah 1983)) (brackets in original); *accord State v. Schroyer*, 2002 UT 26, ¶ 10, 44 P.3d 730.

Role of the Magistrate

As recognized by the magistrate in this case, its role is a limited one, *see* R152:57, *see* Add. A (Aplt. Br.), because the preliminary hearing "is not a trial on the merits, [but] a gateway to the finder of fact." *State v. Talbot*, 972 P.2d 435, 438 (Utah 1998). Although the magistrate should not countenance "facially incredible evidence," *id.*, he or she may not otherwise "sift or weigh the evidence." *State v. Hester*, 2000 UT App 159, ¶ 7, 3 P.3d 725, *cert denied*, 9 P.2d 170 (Utah 2000) (citation omitted); *accord Clark*, 2001 UT 9, ¶ 10. "Instead, the magistrate must view all the evidence in the light most favorable to the prosecution and must draw all reasonable inferences in favor of the prosecution." *Clark*, 2001 UT 9, ¶ 10 (inserts and quotations omitted). "It is not for the [magistrate] at a preliminary hearing to accept the defendant's version of the facts over the legitimate inferences which can be drawn from the [State's] evidence." *See People v. District Court of Colorado's Seventeenth Judicial District*, 803 P.2d 193, 196 (Colo. 1990) (*en banc*) (internal quotes and citations omitted). Deciding between inferences and conflicting evidence is left for the jury. *See Clark*, 2001 UT 9, ¶ 10. Accordingly, "[a]

magistrate errs when he or she chooses an inference resulting in release of a defendant when a reasonable alternative inference" supports the State's case. *See State v. Dunn*, 345 N.W.2d 69, 71 (Wis. App.), *aff'd*, 359 N.W.2d 151 (Wis. 1984).

Here, as set out in the State's opening brief, *see* Aplt. Br. at 3-7, the preliminary evidence established that Lt. Sparks' recall of his interview with defendant differed dramatically from the recording defendant submitted to the CSC. Lt. Sparks specifically remembered defendant admitting that he had accepted a palm pilot from a new employee "in exchange for getting [the employee] assigned to his crew." R152:26, *see* Add. A (Aplt. Br.). When defendant claimed that he no longer knew where the Palm Pilot was, Lt. Sparks asked if it was "lost in his house?" R152:25-26, *see* Add. A (Aplt. Br.). According to Lt. Sparks, defendant guaranteed him that the Palm Pilot was not in his house. *Id.*

Lt. Sparks listened for this "fairly lengthy" conversation when defendant played his recording of the internal affairs interview at the CSC hearing, but never heard it. R152:13, 26-27, *see* Add. A (Aplt. Br.). Instead, the recording defendant played indicated that Lt. Sparks asked only : "Did you accept the Palm Pilot?" and "on the tape the answer is 'No.'" R152:14, *see* Add. A (Aplt. Br.).

Applying the legal standards appropriate to preliminary hearing, Judge Frederick should have denied the motion to quash. To meet the bindover requirement, the State was required to present evidence sufficient to support a "reasonable belief" that defendant "intentionally, knowingly, or with a reckless disregard for the truth," committed

communications fraud. UTAH CODE ANN. § 76-10-1801(7) (2003); *see Clark*, 2001 UT 9, ¶ 16. Lt. Sparks' preliminary hearing testimony that defendant admitted accepting a Palm Pilot in exchange for putting a new employee on his crew, is sufficient to establish that defendant communicated fraudulently to the CSC when he played his recording of the interview that did not include his admission to Lt. Sparks. *See Clark*, 2001 UT 9, ¶¶ 10, 20; *Talbot*, 972 P.2d at 437-38 (directing magistrates to view the evidence in a light most favorable to the prosecution and resolve all inferences in favor of the prosecution). Given defendant's obvious interest in being reinstated to the Davis County Sheriff's Office, the more reasonable inference is that defendant, and not his then counsel, altered the tape. Moreover, as found by the magistrate, "the statements were made by [defendant's] attorney as his representative in a hearing in which [the attorney] was specifically there to represent [defendant's] interest . . . And there is—the tape certainly reflected [defendant's] language and . . . —voice, and the tape had been obtained from [defendant]." R152:58, *see* Add. A (Aplt. Br.).

Defendant speculates that the "fairly lengthy" conversation Lt. Sparks recalled having with defendant was not edited out of defendant's recording, but is still located on the unplayed portion of the internal affairs interview. *See* Aple. Br. at 16. Defendant, however, wholly fails to explain how his failure to play inculpatory portions of the recording for the CSC was any less of a fraudulent communication. *See* Section 76-10-1801. Indeed, by selectively playing only that portion of the tape, edited or not, where he

allegedly denied accepting the Palm Pilot, defendant effectively falsely communicated to the CSC that he made no admissions during the internal affairs interview with Lt. Sparks.

In any event, either Lt. Sparks correctly remembered defendant's admission or he did not. Viewed in the light most favorable to the prosecution, *Talbot*, 972 P.2d at 437-438, and drawing all reasonable inferences in the prosecution's favor, *Clark*, 2001 UT 9, ¶¶ 10-11, the preliminary evidence more reasonably suggests that Lt. Sparks—who had no motive to fabricate—accurately recalled the internal affairs interview *and* defendant's admission that he accepted the Palm Pilot from a subordinate. Judge Frederick should have denied the motion to quash on this ground alone. *Id.*

The State, however, presented additional evidence supporting the bindover. The three-part USSS report concluded that the defendant's recording of the internal affairs interview was altered and contained a suspicious 130 seconds of blank recording. *See* R152:31-32, 49-50, *see* Add. A (Aplt. Br.). Even though Judge Frederick was not given a copy of the USSS report here, he knew that the magistrate had accepted the State's arguments regarding the significance of the report's findings. *See* R152:49-50, 55-58, *see* Add. A (Aplt. Br.). Thus, viewed in the light most favorable to the prosecution, the instant evidence compelled Judge Frederick to deny the motion to quash. The undisputed finding that defendant's recording of the internal affairs interview was altered, together with Lt. Sparks' recall of the interview, constituted at least "plausible" evidence of defendant's guilt, *Dunn*, 359 N.W.2d at 155, and was thus "'sufficient to warrant a prudent person, or one of reasonable caution, in believing . . . that the [defendant] ha[d]

committed" a communications fraud upon the CSC, *Trane*, 2002 UT 97, ¶ 27 (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)). By countenancing the possibility of a different result, Judge Frederick erroneously chose "an inference resulting in release of [] defendant when a reasonable alternative inference" supported the prosecution. *Dunn*, 345 N.W.2d at 71. This was error. *See Clark*, 2001 UT 9, ¶ 10.

RESPONSE TO POINT II OF DEFENDANT'S BRIEF: DISMISSAL OF THE FELONY INFORMATION IS A DISPROPORTIONATE SANCTION FOR A PROSECUTOR'S TARDINESS

In Point II of his brief, defendant asserts that Judge Frederick's dismissal of the second degree felony charge was "not a sanction for (the prosecutor's) tardiness[,] but merely the proper application of the adversarial process where the judge's role is not to make arguments but to evaluate them." Aple. Br. at 19. In support, defendant analogizes to *State v. Holland*, 876 P.2d 357, 364 (Utah 1994) (opinion of Stewart, J., with one justice concurring). *Id.* While Justice Stewart authored the lead opinion in *Holland*, only one other justice concurred in part III upon which defendant relies. *Id.* at 361. Thus, part III "does not represent the views of a majority of the Court," but is rather, in effect a dissent. *Id.* The effective dissent in *Holland* does not support defendant's claim that the instant dismissal was proper.

According to the *Holland* dissent, at the sentencing hearing following Holland's murder conviction, defense counsel failed to rebut the prosecutor's characterization of the murder as intentional. *Id.* at 363. That "failure to respond allowed the trial court to assume that the prosecutor's characterization of the facts was a true and complete version

of those facts, even though all the facts that had been developed" suggested the murder was unintentional. *Id.* at 364.

Defendant broadly assumes that the trial court's "assumption" in *Holland* "was not a sanction on defense counsel for failing to respond[,] but was merely a reaction to the breakdown of the adversarial system of criminal justice." Aple. Br. at 20. From this unsupported and self-serving assumption defendant apparently reasons that the trial court's dismissal here was also not a sanction on the prosecutor for her tardiness, "but merely a reaction to the breakdown of the adversarial system of criminal justice." *Id.* What defendant fails to point out, however, is that the *Holland* dissenters would have remanded for a new penalty hearing, given that the penalty hearing held was "adversarial in form only." *Holland*, 876 P.2d at 364 (opinion of Stewart, J., one justice concurring). According to the *Holland* dissenters, when the lower court's assumptions turn out to be inconsistent with the record evidence, remand for a rehearing is the appropriate remedy. *Id.* Thus, the effective dissent in *Holland* does not support defendant's claim that the instant dismissal was proper.

Alternatively, defendant asserts that even if Judge Frederick's dismissal of the second degree felony information was meant as a sanction for the prosecutor's tardiness, the judge acted within his discretion. Aple. Br. at 20. Defendant cites *Rohan v. Bozeman*, 2002 UT App 109, 46 P.3d 753 (Utah App.), *cert. denied*, 59 P.3d 603 (Utah 2002), in support of his claim. Defendant's reliance on *Rohan*, a civil case, is unavailing in this criminal context.

In *Rohan*, this Court upheld the trial court's dismissal with prejudice, even though the dismissal deprived "Rohan of the opportunity to litigate the merits of his negligence action," on the ground that "Rohan 'had ample opportunity to litigate [his] case . . . but abused such opportunity[.]'" *Id.* at ¶ 32 (elipses in original). "Rohan waited until eighteen days before trial, over two years after he filed his complaint to request a continuance and to formally substitute counsel," with no "reasonable explanation for his dilatory conduct." *Id.* at ¶ 19. Even assuming the prosecutor's tardiness to a single hearing is comparable to appellant Rohan's failure to litigate his negligence action, dismissal of the felony information was inappropriate.

In citing *Rohan*, and other civil cases dealing with attorney's fees, *see Stewart v. Utah Public Service Comm.*, 885 P.2d 759, 782 (Utah 1994); *Jensen v. Bowman*, 892 P.2d 1053, 1058 (Utah App.), *cert. denied*, 899 P.2d 1231 (Utah 1995), defendant wholly ignores the distinction between civil and criminal cases set out in the State's opening brief, *see* Aplt. Br. at 12. Dismissal of a civil action may well be an appropriate remedy when a party fails to observe the orders of a court "because there the loss falls upon private interests and those who invoke the power of a court must be obedient to its orders or lose its powers to serve their purposes." *See Commonwealth v. Carson*, 510 A.2d 1233, 1235 (Pa. 1986). Criminal cases, on the other hand, "involve issues of public justice; issues that transcend the immediate parties." *Id.* While "sanctions may be imposed upon individuals, including counsel for either side; sanctions that vindicate the authority of the court to maintain its schedule and enforce its orders[,]" dismissal of criminal charges is

warranted only when a prosecutor's tardiness "involve[s] a failure of justice or prejudice to the defendant." *Id.* "When such interests are not involved, the offending party may be otherwise sanctioned without defeating the public interest." *Id.* Defendant's total failure to address this distinction undermines his claim that Judge Frederick acted within his discretion in dismissing the felony information here.

As pointed out in the State's opening brief, *see* Aplt. Br. at 13, defendant's claim is further undermined by the fact that he alleged no prejudice resulting from the prosecutor's tardiness below, *id.*, and Judge Frederick found none in dismissing the felony information. R107-108, *see* add. C (Br. of Aplt.). While defendant complains that "there was a consistent and repeated approach of indifference demonstrated by the State" in this case, *see* Aple. Br. at 20, what defendant really appears to be saying is that the prosecutor had ample time to file a written response to the motion to quash prior to the hearing, but did not. Neither the prosecutor's decision to wait until the hearing to file a response, or her tardiness to the hearing itself, however, is fairly characterized as repetitive indifference. In any event, defendant's complaints about the prosecutor's tardiness do not establish any consequent prejudice or that dismissal was warranted. *See Carson*, 510 A.2d at 1235-36 (recognizing that even though the district attorney "cavalierly exemplified a gross indifference to the proper demands" of the trial court's schedule, that "indifference" "cannot inure to the benefit of a defendant who suffers no injustice from the (consequent) delays") (Papadakos, J., concurring). *See also Commonwealth v. Shaffer*, 712 A.2d 749, 752 (Pa. 1998) (holding that while prosecutor's

conduct in failing to comply with a court order regarding the time for trial was improper, "discourteous," and an "inexcusable affront to the court," dismissal of the criminal charges was "excessive and thus, an abuse of discretion"); *accord People v. Countryman*, 514 N.E.2d 1038, 1041 (Ill. App. 1987) (recognizing that the trial court's "concern with the way the Attorney General's office handles its cases [was] not a proper ground for dismissing the [] complaint for want of prosecution").

Finally, the only criminal case defendant cites is a one-page, unpublished memorandum decision, *Provo City v. Lundahl*, 2001 UT App 40. The *Lundahl* trial court dismissed a charge of driving on suspension against Lundahl "because Provo failed to respond to her motion." *Id.* Significantly, Lundahl, and not Provo City, appealed the dismissal because "she wanted the trial court to address the issues raised in her motion." *Id.* This Court dismissed the appeal, observing that Lundahl could only appeal from a "final judgment of conviction," and because she had not been convicted, Lundahl necessarily "had nothing to appeal." *Id.* Thus, *Lundahl* does not address the propriety of the trial court's dismissal in that, or any other criminal prosecution. *Id.* Rather, the most the case stands for is the general proposition that a defendant may not appeal from a dismissal. *Id.*

CONCLUSION

The Court should reverse Judge Frederick's order quashing the felony information and remand this matter for trial.

RESPECTFULLY SUBMITTED on 7 June 2004

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CERTIFICATE OF DELIVERY

I certify that a copy of the foregoing BRIEF OF APPELLANT was hand-delivered on 7 June 2004, to the following:

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